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In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 73-1095

ABE LAVINE, *Appellant,*

vs.

SYLVIA SHIRLEY, *Appellee.*

No. 73-1016

JOHN L. LASCARIS, *Appellant,*

vs.

SYLVIA SHIRLEY, *Appellee.*

On Appeal from the United States District Court for the Northern District of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

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Table of Contents

	Page
Motion for Leave to File Brief Amicus Curiae in Support of Appellants on Behalf of Pacific Legal Foundation	1
Brief of Amicus Curiae in Support of Appellants on Behalf of Pacific Legal Foundation	5
Interest of Amicus	5
Opinion Below	6
Argument	6
I. The absent parent syndrome, the basis of eligibility in the vast majority of AFDC cases, creates a critical strain on public funds	6
II. Requiring the cooperation of the deserted mother is a necessary administrative tool designed to implement the specific requirements of the Social Security Act	11
III. Removal of incentives to the AFDC mother to cooperate in identifying and locating the absent father will have particularly serious consequences in paternity determination	18
IV. Striking the proper balance between competing legislative goals is not a judicial function	19
Conclusion	24

Table of Authorities Cited

Cases

Pages

Dandridge v. Williams, 397 U.S. 471 (1970) 2, 23

Jefferson v. Hackney, 406 U.S. 535 (1972) 2, 21, 22

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 2, 9, 10

Shea v. Vialpando, ___ U.S. ___, 40 L.Ed.2d 120 (1974) .. 14, 20

Shirley v. Lavine, 365 F.Supp. 818 (1973) 6, 11, 20, 21, 23

Townsend v. Swank, 404 U.S. 282 ..... 21, 22

Wyman v. James, 400 U.S. 309 (1971) 2, 8, 9, 15, 16, 17

Rules

Supreme Court Rule 42 1

400 U.S. at 311 15

400 U.S. at 315, 316 15

400 U.S. at 319 15

400 U.S. at 326 15

Statutes

42 U.S.C. 601 15

42 U.S.C. 602 15

42 U.S.C. 602(a)(7), (8) 12, 22

42 U.S.C. 602(a)(10) 21, 22

42 U.S.C. 602(a)(11) 12, 22

42 U.S.C. 602(a)(17) 12, 22

42 U.S.C. 602(a)(18) 12, 22

42 U.S.C. 602(a)(19) 11

Pages

42 U.S.C. 602(a)(21) 12, 22

42 U.S.C. 602(a)(22) 13, 22

42 U.S.C. 606 11

42 U.S.C. 606(a) 6, 11

42 U.S.C. 606(a)(2)(B) 22

New York Social Services Law, Section 101-a 8, 11, 24

Government Publications

Final Report of the Task Force on Absent Parent Child Support, California State Social Welfare Board, January, 1971 7

Social Statistics: A Monthly Summary, New York State Department of Social Services, Volume XXVI, Number 2, February, 1974, issued June 20, 1974 8

Unplanned Parenthood, California State Social Welfare Board, April, 1974 ..... 18, 19

1973 Annual Report of the New York State Department of Social Services, April, 1974 ..... 13, 20

Law Review Article

Zumbrun, Momboisse and Findley, Welfare Reform: California Meets the Challenge, 4 Pac.L.J. 739 (1973) 6

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

This motion of the Pacific Legal Foundation for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42, consent to the

filing of a brief having been granted by counsel for Appellant Lascaris but withheld by counsel for Appellee Shirley and Appellant Lavine.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the eighteen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation is gravely concerned by the action of the court below in overturning a state welfare statute on a rationale which ignores the controlling precedents established by this Court in *Wyman v. James*, 400 U.S. 309 (1971); *Jefferson v. Hackney* 406 U.S. 535 (1972); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973); and *Dandridge v. Williams*, 397 U.S. 471 (1970), among others.

Pacific Legal Foundation considers that this case is of special significance in that it raises fundamental questions concerning the ability of all states to protect public assistance funds. Procedures requiring welfare recipients to furnish information necessary to verify the deprivation and establish the amount of income and resources upon which eligibility depends are in effect in every state; unless the District Court

decision is reversed, the ability of public officials to ensure that assistance is granted only to the needy will be effectively hamstrung.

Pacific Legal Foundation believes that the magnitude of this issue was not fully developed in the District Court and doubts that the parties will address the scope of the absent parent issue before this Court.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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July, 1974

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BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

INTEREST OF AMICUS

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The three-judge court, United States District Court for the Northern District of New York, in an opinion reported at 365 F.Supp 818 (1973), declared Section 101-a of the New York Social Services Law to be void, unenforceable, and without effect insofar as it makes recipient cooperation concerning establishing paternity or obtaining support a condition of eligibility for Aid to Families with Dependent Children (AFDC).

ARGUMENT

I

THE ABSENT PARENT SYNDROME, THE BASIS OF ELIGIBILITY IN THE VAST MAJORITY OF AFDC CASES, CREATES A CRITICAL STRAIN ON PUBLIC FUNDS

One of the most basic tenets of our society is family responsibility. The fundamental principle that the family is the basic unit in society and has the primary responsibility for the support and care of its own members is no less valid when viewed in the welfare context.[1] A major eligibility requirement for the Aid to Families with Dependent Children-Family Group (AFDC-FG) program is that the family unit must be deprived of at least one parent. (42 USC 606(a).) Deprivation usually results from the absence of the father from the family group.

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[1]See Zumbrun, Mombolsse and Findley, "Welfare Reform: California Meets the Challenge," 4 Pac.L.J. 739, 769-774, a copy of which has been lodged with the Clerk of the Court.

The California State Social Welfare Board in its Final Report of the Task Force on Absent Parent Child Support (January 1971)[2] found that although a small percentage of absent fathers of California's AFDC children were dead or incapacitated, about 85 percent were absent because of divorce, separation, desertion, imprisonment, or because they were never married to the mother of the AFDC child.[3] During fiscal year 1969-1970, only about 15 percent of California's absent fathers contributed to the support of their AFDC children, yet that small percentage contributed a total of $36,500,000, most of which was used to offset welfare grants with resultant savings in county, state, and federal tax dollars.[4] The Task Force further found that of the absent parents on whom statistics were available, a sizeable majority were employed and had an income sufficient to provide at least some child support.[5]

One of the major reasons for the low contribution rate is the difficulty in locating absent parents. This difficulty has been exacerbated by judicial rulings, such as that in the court below, striking down attempts by states to establish programs to identify and locate absent parents through information provided by the AFDC mother.

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[2]A copy of this report has been lodged with the Clerk of the Court.

[3]Task Force Report, 8.

[4]Task Force Report, 12.

[5]Task Force Report, Appendix 3e.

Statutes such as Section 101-a of the New York Social Services Law represent an attempt by the states to reduce the staggering costs of welfare[6] through establishment of procedures designed to identify, locate, and secure support payments from the absent parents. In this effort, the use of grant termination as a sanction to encourage cooperation on the part of AFDC mothers is necessary to the purpose of protecting public funds.

This Court stated in *Wyman v. James*, 400 U.S. 309 (1971), and discussed more extensively hereafter:

> "The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not

[6]Statistics released in June, 1974, by the New York State Department of Social Services setting forth public assistance (PA) expenditures for the month of February, 1974, indicate that of the total $133.2 million expended, $116.8 million was for the Aid to Dependent Children (ADC) program. This figure does not include administrative costs, food stamp benefits, cost of services and medical assistance. Medical assistance expenditures alone for February 1974 totaled $149.4 million. Although there is apparently no description of medical assistance expenditures by program, if the percentage of public assistance expenditures for ADC can be correlated to expenditures for medical assistance, it would be concluded that 88 percent of the medical assistance expenditure of $131.5 million was allocated to the ADC program. ("Social Statistics: A Monthly Summary", New York State Department of Social Services, Volume XXVI, Number 2, February, 1974, issued June 20, 1974. A copy of this report has been lodged with the Clerk of the Court.)

> unreasonable, in the Fourth Amendment sense or in any other sense of that term, that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance.
>
> "One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same. It might well expect more, because of the trust aspect of public funds, and the recipient, as well as the caseworker, has not only an interest but an obligation." 400 U.S. 309, 318-319.

Attempts by the legislative branch to limit improper or unnecessary expenditure of public funds should not be lightly swept aside by the courts. As this Court declared in *New York State Department of Social Services, et al. v. Dublino*, 413 U.S. 405, 37 L.Ed.2d 688, 694 (1973), reversing the lower court's overturning of the New York Work Rules:

> "This is a sweeping step that strikes at the core of state prerogative under the AFDC program—a program which this Court has been careful to describe as a 'scheme of cooperative federalism.' [Citations omitted.] It could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. . . . "

Even more so than in *Dublino*, the striking down of the cooperation requirement here will greatly impair

the ability of states to deal with the mounting costs of absent parenthood and concomitant limitation on availability of funds for families driven to financial dependency by this desertion.

This Court wisely observed in *Dublino:*

> " . . . To the extent the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution." 413 U.S. ....., 37 L.Ed.2d 688, 694-695.

If an AFDC family's sense of self-reliance and civic responsibility may be held to require cooperation with the Work Rules, logic dictates that it also requires cooperation in securing support from absent parents. Nothing could do more to alleviate fiscal hardships and provide greater resources for those truly in need than the procurement from absent parents of the support owed to their deserted families.

II

REQUIRING THE COOPERATION OF THE DESERTED MOTHER IS A NECESSARY ADMINISTRATIVE TOOL DESIGNED TO IMPLEMENT THE SPECIFIC REQUIREMENTS OF THE SOCIAL SECURITY ACT

In striking down Section 101-a of the New York Social Services Law, the District Court commented:

> "While we are not outraged by nor unsympathetic to New York's effort to compel Anna Stuck to cooperate in a proceeding to compel support for her youngest child to the extent required by §101-a, we find no authority for engrafting such a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits." 365 F.Supp. 821.

The District Court thus incorrectly presupposed that Congress has delineated a set of specific eligibility requirements for Aid to Families with Dependent Children. With limited exceptions, such as registration for manpower services, training and employment,[6a] the Social Security Act provides only a single broad guideline for AFDC eligibility—dependency, resulting from a combination of deprivation and need.[7]

Congress has put the primary burden of determining dependency upon the states, each of which must submit a State Plan meeting the requirements of 42 USC 602(a).

[6a] 42 USC 602(a)(19).

[7] 42 USC 606.

As a function of determining need, the state is required to take into consideration the income and resources of any child or custodial relative claiming AFDC eligibility.[8] One of the major sources of potential income and resources is the absent parent. Yet unless this source is identified and located, it will merge with the 85 percent of absent parents who contribute nothing to the support of their AFDC children. Frequently, only the mother of the AFDC children can provide the information—name, address, social security number, vehicle registration number or name of employer—which will locate the absent parent.

As a function of determining deprivation, the states must determine the fact of the absence of the parent, provide prompt notice to appropriate law enforcement authorities of the desertion;[9] establish paternity in the case of a child born out of wedlock, secure support from the absent parent;[10] enter into cooperative arrangements with appropriate courts and law enforcement officials to assist in securing such support;[11] provide quarterly reports to the supervising federal agency of the name, address, social security number and other information of nonsupporting parents;[12] and cooperate in locating and securing sup-

[8] 42 USC 602(a)(7), (8).
[9] 42 USC 602(a)(11).
[10] 42 USC 602(a)(17).
[11] 42 USC 602(a)(18).
[12] 42 USC 602(a)(21).

port from absent parents from other states within the state's jurisdiction.[13]

It is true that the Social Security Act does not specify that a recipient must as a condition of eligibility cooperate in providing information which will assist the state in establishing paternity or securing support from an absent parent. It is important to note, however, that the Act does not specify that a recipient must, as a condition of eligibility, cooperate in providing information which will establish income or resources. Nevertheless, it has never been seriously argued that the state may not require the recipient to provide such information as a condition of eligibility —except where the information sought relates to an absent parent.

There is no logical reason for this exception in that information on the identity and location of absent parents is necessary to determine both facets of dependency. Absence of the father is the basis of the recipient's deprivation in approximately 80 percent of all New York AFDC cases.[14] In order for this deprivation to exist, the father must in fact be absent from the home. Yet state audits in 1973 determined that in 42.8 percent of AFDC cases found to be ineligible, the ineligibility was due to an unreported father in the home who was capable of providing support.[15]

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[13]42 USC 602(a)(22).

[14]1973 Annual Report of the New York State Department of Social Services, Publication No. 1016 (4/74) part III, 8.

[15]1973 New York Annual Report, part II, 2 and part III, 8.

Because the mother is frequently the only source of information concerning the identity and location of the absent parent, the effect of the District Court decision will be to compound this already serious problem and greatly increase the rate of ineligibility error. Putting it bluntly, the decision is an invitation to commit fraud. In this context, it may be asked why an AFDC mother would refuse to identify and assist in locating the absent father. The answer suggests itself in the above statistic that 42.8 percent of New York's AFDC case ineligibility results from the presence of an unreported father in the home who was capable of providing support and presumably was using the AFDC grant as an illegal windfall.

The Social Security Act imposes a set of comprehensive requirements upon the states to ensure that only eligible persons receive AFDC and to further ensure that those persons having the primary legal obligation to support dependent children are required to fulfill that obligation. As this Court noted in *Shea v. Vialpando*, ... U.S. ....., 40 L.Ed.2d 120, 129 (1974):

> "From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered."

In the absent parent context, these requirements are all too frequently frustrated because the state is

unable to take the first step—identifying the absent parent. This information is peculiarly within the knowledge of the AFDC mother and cooperation of the mother is a prerequisite for the states to carry out their federally-mandated functions.

In *Wyman v. James*, 400 U.S. 309 (1971), this Court was presented with the issue whether an AFDC recipient could refuse a home visit by the case worker without risking the termination of all AFDC benefits. As was noted by the Court, the home visit was not required by federal statute or regulation[16] but was imposed by state law.[17] Nonetheless, the Court concluded that taking into consideration the requirements imposed upon the states by the Social Security Act—to maintain and strengthen family life[18], to provide such reports as the Secretary of Health, Education and Welfare may require, to take into consideration any other income and resources of any child or relative claiming aid and to bring conditions of neglect, abuse or exploitation of an AFDC child to the attention of the appropriate court or law enforcement agencies[19]—authorized the state requirement of home visits as a "reasonable administrative tool" which "serves a valid and proper administrative purpose for the dispensation of the AFDC program. . . ." 400 U.S. at 326.

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[16]400 U.S. at 319.
[17]400 U.S. at 311.
[18]42 USC 601.
[19]42 USC 602; 400 U.S. at 315, 316.

In a perceptive comment, this Court noted:

> " . . . What Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, . . . and to avoid questions of any kind.
>
> "We are not persuaded, as Mrs. James would have us be, that all information pertinent to the issue of eligibility can be obtained by the agency through an interview at a place other than the home, or, as the District Court majority suggested, by examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel. [Citation omitted.] Although these secondary sources might be helpful, they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits, or of impending medical needs." [Footnote omitted] *Wyman v. James*, 400 U.S. at 321-322.

The Court in *James* analogized the situation of the noncooperative AFDC recipient to that of a taxpayer whose income tax return was being audited by the Internal Revenue Service and who has been asked to furnish proof of a beneficial deduction:

> "If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detri-

> ment of the taxpayer's own making. So here Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." 400 U.S. at 324.

The requirement to cooperate in a home visit in *James* is analogous to the requirement to cooperate in identifying and locating absent parents. While these requirements are not stated as such in the Social Security Act, each is in the words of this Court, "a reasonable administrative tool" needed by the state to determine information upon which eligibility for aid may be established. Like the plaintiff in *James*, the plaintiff below has not been forced to cooperate.

> "Her wishes in that respect are fully honored. . . . The only consequence of her refusal is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits." *Wyman v. James,* 400 U.S. at 325.

If the plaintiff below has something she wishes to hide, she may do so. But she may not conceal information needed by the state to fulfill its duties under the Social Security Act and expect to maintain eligibility for benefits. The recipient must bear at least a part of the responsibility to ensure that welfare benefits are paid only to those entitled to receive them

and that the deserting father pay his fair share of his family's support.

III

REMOVAL OF INCENTIVES TO THE AFDC MOTHER TO COOPERATE IN IDENTIFYING AND LOCATING THE ABSENT FATHER WILL HAVE PARTICULARLY SERIOUS CONSEQUENCES IN PATERNITY DETERMINATION

The cooperation of the AFDC mother in identifying and locating the father is the single most valuable factor in a situation of marital disassociation. Such cooperation becomes absolutely indispensable in the situation where marriage never existed. In such cases, the mother is the only person who can furnish the identity of the father of the AFDC child and the state has no recourse other than to require her cooperation.

A study made by the California State Social Welfare Board,[20] established the extent of the problem of illegitimate children on AFDC. The study notes that in 1973, California had 161,507 families with illegitimate children receiving AFDC, comprising 43 percent of the caseload.[21] In January of 1973, California had an AFDC caseload of 991,274 children of which 244,117 or 24.6 percent were illegitimate.[22] Taking into account cash grants, medical care, food stamps, social

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[20] *Unplanned Parenthood*, (April, 1974), a copy of which has been lodged with the Clerk of the Court.

[21] *Unplanned Parenthood*, 26.

[22] *Unplanned Parenthood*, 27.

services and administrative expenses, the California State Social Welfare Board estimated the cost of supporting and caring for the nearly one-quarter million illegitimate children on AFDC in California in 1973 was $474,305,000.[23] This near half billion dollar amount must be taken from the pockets of county, state and federal taxpayers because of the failure of unwed fathers to provide support for their children. The net effect is to reduce the amount of welfare funds available to all recipients.

Judicial rulings such as that of the District Court in the instant case stress the importance of individual rights and freedoms. Unfortunately, they ignore the responsibilities correlative to these rights. Just as it is the obligation of the unwed father to bear the cost of support of his children to the best of his economic ability, it is the responsibility of the AFDC mother to identify and assist in location of the father so that this obligation may be imposed.

IV

STRIKING THE PROPER BALANCE BETWEEN COMPETING LEGISLATIVE GOALS IS NOT A JUDICIAL FUNCTION

The District Court noted that the case at bar involves two distinct goals of the AFDC program when a family is deserted by a parent who fails to fulfill his obligation of support. One of the goals of AFDC is to provide assistance to the deserted family. An equally desirable goal is to enforce the legal obligation

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[23] *Unplanned Parenthood*, 27-28.

of the absent parent to support his child. "While distinct, these goals are not necessarily competing. They become so only when one is pursued as [sic] the expense of the other." *Shirley v. Lavine*, 365 F.Supp. 818, 821.

In passing, it should be noted that the District Court's analysis overlooks the fundamental requirement that desertion must in fact occur before these families become eligible for AFDC and the first enumerated goal becomes applicable. The 1973 Annual Report of the New York State Department of Social Services found that the largest single type of eligibility error identified was the granting of public assistance based on the claim that the father was absent from the home when in fact he was not. As previously noted, erroneous claims of an absent parent accounted for 42.8 percent of all AFDC cases found to be ineligible.[24] Perhaps the District Court should have included a third goal—ensuring that only eligible persons receive assistance. *Shea v. Vialpando*, ... U.S. ....., 40 L.Ed.2d 120, 129 (1974).

Nonetheless, while chiding the State of New York for allegedly pursuing the goal of obtaining support from absent parents at the expense of the goal of providing assistance to families alleging desertion, the District Court decided that the State should pursue the goal of providing assistance at the expense of the goal of obtaining support and implicitly at the expense of the goal of providing assistance only to

[24]New York 1973 Report, Part II, 2.

eligible families. In so deciding, the District Court ignores the rule espoused by this Court in *Jefferson v. Hackney*, 406 U.S. 535 (1972), that:

> "Striking the proper balance between these competing policy considerations is, of course, not the function of this Court. . . . So long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act, appellants' policy arguments must be addressed to a different forum." 406 U.S. 535, 541.

The District Court's reliance (365 F.Supp. 824) on Section 402(a) (10) of the Social Security Act (42 USC 602(a) (10)) and on *Townsend v. Swank*, 404 U.S. 282, was clearly misplaced. This section, which provides that AFDC benefits must "be furnished with reasonable promptness to all eligible individuals," was interpreted in *Jefferson*, 406 U.S. 535, 544-545, with particular care given to limitation of the scope of *Townsend:*

> "That section was enacted at a time when persons whom the State had determined to be eligible for the payment of benefits were placed on waiting lists, because of the shortage of state funds. The statute was intended to prevent the States from denying benefits, even temporarily, to a person who has been found fully qualified for aid. [Citation omitted.] Section 402(a) (10) also forbids a State from creating certain exceptions to standards specifically enunciated in the federal act. See, e.g., *Townsend v. Swank*, 404 U.S. 282 (1971). It does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of

need, income, and benefits. [Footnote omitted.] Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellant's invitation to change this longstanding statutory scheme simply for policy reasons of which we are not the arbiter."

This Court in *Jefferson* read Section 402(a) (10) as barring states from creating certain exceptions to *specific* standards in the Act. In *Townsend, supra,* the issue was an Illinois statute which denied AFDC eligibility to children aged 18 through 20 who were in college. This was in direct conflict with Section 406(a) (2) (B) of the Act which specified eligibility for a child under age 21 who was a "student regularly attending a school, college, or university." In the case at hand, however, there is no provision in the Act which similarly specifies eligibility for a mother who refuses to provide information as to the identity and location of the absent parent or otherwise refuses to cooperate in obtaining support for his children.

Rather than dealing with specific eligibility standards and creating exceptions thereto, as was the case in *Townsend*, New York is attempting to carry through its general mandate to determine dependency through verifying deprivation and resources. New York's statute does not contravene the Federal Act, but rather serves as the only feasible means of complying with the requirements imposed on the state by Sections 402(a) (7), (11), (17), (18), (21), and (22) of the Act.

In a decision reversing the lower court's voiding of the Maryland method of limiting the amount of AFDC grants to large families, this Court declared:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, 397 US 254, 25 LE2d 287, 90 S Ct 1011. But the Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. [Citations omitted.]" *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

This case does not raise the issue of procedural safeguards. The record is clear that the *Goldberg* requirements were provided and used. 365 F.Supp. 818. The sole issue is whether state officials can protect the distribution of public welfare funds by weeding out the nonneedy and the needy-by-choice obstructionists from the myriad of potential recipients.

CONCLUSION

The enforcement of child support is one of the few areas of preventive welfare. The State of New York, through the enactment and enforcement of Section 101-a, is carrying out its federally-mandated duty to conserve the limited amount of welfare funds by attempting to identify and locate the absent father for the dual purpose of verifying his absence from the AFDC home and ensuring that he fulfill his support responsibility to the best of his economic capability. The New York statute, in requiring the cooperation of the mother in this identification and location procedure, is merely requiring her to assist in the determination and verification of her own eligibility and to make available a larger pool of welfare funds for all those truly in need. Pacific Legal Foundation, as *amicus curiae*, therefore urges that the decision of the District Court be reversed.

Respectfully submitted,

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